IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

DERRICK DEMARIO JOHNSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No.: 5:15-CV-00320-D
	)	
ROBERT PATTON, Director,	)	
Oklahoma Department of Corrections,	)	
	)	
Respondent.	)	

BRIEF IN SUPPORT
OF PETITION FOR A WRIT OF HABEAS CORPUS
BY A PERSON IN STATE CUSTODY PURSUANT TO 28 U.S.C. § 2254

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DERRICK DEMARIO JOHNSON,	)	
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	)	
ROBERT PATTON, Director,	)	
Oklahoma Department of Corrections,	)	
	)	
Respondent.	)	

STATEMENT OF THE CASE

On April 8, 2010, Petitioner Derrick Johnson (hereinafter "Mr. Johnson") was charged with first degree malice aforethought murder in the District Court of Oklahoma County. The state charged that Mr. Johnson killed the victim, Mr. Carlos Marzett, by shooting him with a firearm on March 31, 2010, after three prior felony convictions. A preliminary hearing was conducted and he was bound over for trial.

A jury trial was conducted on the charge in June 2011 that ended in a mistrial because the jury could not reach a verdict. In a jury trial conducted on April 9-13, 2012, the jury returned a verdict of guilty and recommended a sentence of life imprisonment with the possibility of parole. On May 17, 2012, Petitioner was sentenced consistent with the jury's recommendation.

Petitioner appealed the conviction and sentence to the Oklahoma Court of Criminal Appeals. In his brief, Petitioner asserted six grounds of error, five of which are presented herein. After consideration of the issues presented, the Court of Criminal Appeals affirmed Petitioner's Judgment and Sentence on August 6, 2013, by unpublished opinion in Case No. F-2012-457.

On August 30, 2013, Petitioner filed a *pro se* Petition for Writ of Habeas Corpus in this Court, assigned case number 5:13-CF-00935-D. The State of Oklahoma filed its response on October 9, 2013; Petitioner replied on November 4, 2013. Magistrate Judge Gary M. Purcell filed his Report and Recommendation on March 17, 2014 and Mr. Johnson filed his objection to the Report and Recommendation on April 7, 2014.

On May 5, 2014, Mr. Johnson, by and through the undersigned counsel, filed a *Motion to Dismiss Without Prejudice* Mr. Johnson's *pro se* Petition for Writ of Habeas Corpus. On June 30, 2014, Judge Timothy DeGiusti granted the motion and entered a judgment of dismissal without prejudice to refiling.

On November 3, 2014, Petition filed an Application for Post-Conviction relief in Oklahoma County District Court, asserting Petitioner received ineffective assistance of appellate counsel. On February 27, 2015 the petition was denied. No appeal was filed and the Petition in this instant case was filed on March 27, 2015.

STATEMENT OF THE FACTS

At Mr. Johnson's trial by jury, the primary eyewitness against Mr. Johnson (and the only witness to have claimed to have actually seen the shooting of victim Mr. Carlos Marzett) was "unavailable witness" Kanita Bacy, whose preliminary hearing testimony was read to the jury.

Ms. Bacy testified that she was being held in custody at the Oklahoma County jail on unrelated charges and that she had not been offered a specific plea agreement. Tr. III at 121-122. She testified that she did not want to testify in the preliminary hearing but was being compelled to do so. *Id.* at 122. Ms. Bacy testified that she also went by the name of Genuwine. *Id.* at 123-124. She testified that she knew the victim, Mr. Marzett, whom she called CC, and that she and Mr. Marzett and another individual named Tonya (LaTonya Tate) were present in Tonya's apartment when Mr. Johnson, known as "Slim," came to the apartment to discuss a disagreement he had with Mr. Marzett. *Id* at 124-129.

Ms. Bacy testified on direct examination that when Mr. Johnson came into the apartment he was carrying a t-shirt in his hands, that he then dropped the shirt, pulled a handgun from a back pocket, and shot Mr. Marzett, who was unarmed, in the chest. *Id.* at 130-133. Mr. Johnson and Mr. Marzett then fought over the gun. *Id*. at 133-134. She did not remember whether a second shot was fired, she claimed, although he admitted that during interviews with law enforcement she had said a second shot was fired and that at some point she believed that Marzett was shot a second time. *Id*. at 135. About 15-20 minutes elapsed from the time Mr. Johnson entered the apartment to the time he left. *Id*. at 136. Ms Bacy admitted that after the shooting she had lied to police about her name and testified that she did so because she did not want to be involved in the investigation. *Id.* at 138.

On cross-examination, Petitioner's defense counsel elicited testimony from Ms. Bacy that she had six felony convictions; that she had been smoking "quite a bit" of cocaine the day of the shooting, including just 30 to 35 minutes prior to the shooting; that she had later been arrested; and that she had then contacted law enforcement to admit her true identity and to provide information concerning the shooting. *Id*. at 139-142. Defense counsel questioned Ms. Bacy concerning the shooting and elicited her testimony that the victim had left the apartment for about 20 minutes, that he then came back to the apartment that she did not see the victim with a gun, that she did not know what the victim did for a living, that she "clearly" saw Petitioner shoot the victim in the chest and she then saw them struggle in the apartment, and that Petitioner was in the apartment for 10 to 15 minutes before he left. *Id.* at 132-133; 143-147.

Contrary to Ms. Bacy's testimony that she "clearly" saw Marzett get shot in the chest, the state medical examiner testified that the victim's death was caused by a single gunshot wound to his back at close distance, perforating his lung and heart with an exit wound through the chest. Tr. IV at 13-14, 16, 22.

No other witness claimed to have seen the shooting except for defense witness, Mr. Thomas Joseph, whose testimony was inconsistent with Ms. Bacy's, but also inconsistent with the medical examiner's testimony, contrary to other witness testimony, and inconsistent with previous statements he had made. Mr. Joseph testified that on the day of the shooting he was present in an apartment where he was "smoking PCP" and several individuals were smoking cocaine.Tr. V at 6-11. He testified that Mr. Marzett, who he called CC, left the apartment and returned about 30 minutes later, that Mr. Marzett "was saying he wanted his stuff back" and waiving a black handgun. *Id.* at 11-12. Mr. Joseph testified that Mr. Johnson, who was present in the apartment, and CC began struggling over the gun, the gun "went off, " that Mr. Johnson, whom he knew as Slim, was shot in the leg or foot, and that he then left the apartment because Slim and CC were tussling over the gun. *Id.* at 12-13. He testified that he heard a second shot before he got in his car and he then "went to Texas. *Id.* at 14.

The States' rebuttal witness, a Kansas law enforcement officer, testified that during a custodial interview with Mr. Joseph conducted while he was incarcerated in October 2011 Mr. Joseph stated that he had some information concerning a homicide in Oklahoma that occurred in the fall of 2010, that he saw the victim, Mr. Marzett, raise a handgun, that his girlfriend, Amber Spiegle grabbed the gun, the gun went off and struck Mr. Johnson in the foot, and he then saw Johnson shoot the victim in the head.

Another witness, Ms. Latonya Tate, who rented the apartment where the shooing occurred, testified that on the day of the shooting, the victim, known as CC, and Ms. Bacy, known as Genuwine, were the only other people in her apartment besides herself before Mr. Johnson arrived. Tr. II at 151. Ms. Tate testified that on the day of the shooting, sometime before lunch, she heard Mr. Johnson on the telephone, that he called Marzett, whom she knew as CC, and stated he was "on his way over with a pistol." *Id* at 174-175. (Ms. Bacy, however, testified that she was closer to Marzett than Tate, and that she could not hear the person talking on the other end of the phone and that there was nothing wrong with her hearing. *Id.* at 143.) At any rate, Ms. Tate testified that she was in her kitchen when she heard two gun shots, she saw the victim "hit the floor," and she then ran out of her apartment and down the stairs where she saw Mr. Johnson cleaning a pistol with a towel. Tr. II at 151, 156-159, 162. She also testified that Mr. Johnson called her from the county jail after his arrest three or four times and that he told her not to testify at his trial. *Id.* at 166, 172.

Ms. Tate also testified that Mr. Joseph was not in her apartment at the time of the shooting. Tr. II at 159; Tr. V at 29.

Daniel Cassil testified he was repairing a hot water heater about 100 feet away from Ms. Tate's apartment. Tr. II at 128. He heard two gunshots and went outside where he saw Mr. Johnson coming down the stairs from Ms. Tate's apartment. Mr. Johnson had a gun in his hand and he had what appeared to be blood on his pants and his hands. Tr II 128-129.

Ms. Sheryl Young testified that before Marzett was shot Mr. Johnson was upset because "he had got in a fight with a gentleman named CC" and he said "he was going to call somebody to get a burner and he was going to kill [Marzett] for what he had done to [Mr. Johnson]." Tr. III at 13-14. Ms. Young testified that Petitioner later appeared at her apartment with a gunshot wound to his foot and he advised her to call "our attorney," a statement she interpreted to mean she should call the attorney that both she and Mr. Johnson had previously hired. Tr. III at 18-20. Ms. Young testified that Mr. Johnson's girlfriend, "Liz," picked up the gun and carried it out of Ms. Young's apartment and that Mr. Johnson took off all of his clothes and left the apartment "butt naked." *Id.* at 20-21.

Ms. Lyons testified that she was Mr. Johnson's girlfriend and that on the day of the shooting she had witnessed two altercations between Mr. Johnson and Marzett, including an incident in which Mr. Marzett hit Mr. Johnson on the side of his face. Tr. III at 53. Ms. Lyons testified that Mr. Johnson and Marzett had argued over money that Marzett owed him. *Id.* at 52-53. She corroborated Ms. Young's testimony that Mr. Johnson later appeared at Mr. Young's apartment covered in blood and holding a gun and that he then stripped off all of his clothing. *Id*. at 56. Ms. Lyons testified she hid the gun in a hole behind Ms. Young's house, *id*. at 58, and that she purchased clothing for Mr. Johnson and took him to a hospital in his mother's car. *Id*. at 64.

Lorenzo Stanback testified that Mr. Johnson told him defendant shot Mr. Marzett first with a 0mm Hi Point and then the two men wrestled over the gun and defendant got shot. Tr. III at 154-155. He further testified that defendant called him from jail and asked him to talk to Ms. Tate and Ms Bacy about not testifying. Mr. Stanback admitted he contacted both Ms. Tate and Ms. Bacy as requestd by defendant. Tr. III at 157-158.

The jury found Mr. Johnson guilty as charged.

STANDARD OF REVIEW

For claims adjudicated on the merits in state court proceedings, a state prisoner petitioning for habeas corpus relief under 28 U.S.C. § 2254 is not entitled to relief unless the state court decision: 1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court of the United States; or 2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. 28 U.S.C. § 2254(d)(1)(2).

A state court decision is "contrary to" clearly established federal law as defined by Supreme Court precedent where it is "substantially different from the relevant precedent of this Court." *Williams v. Taylor,* 529 U.S. 362, 405 (2000) (O'Connor, J., concurring). A state court decision can be "contrary to" Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or "if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from [Supreme Court] precedent. *Id.* A state court "unreasonably applies" clearly established federal law as determined by the Supreme Court when "the state court identifies the correct governing legal rule from [Supreme Court] cases" but unreasonably applies it to the facts of the particular state prisoner's case." *Id.* *See also Bell v. Cone,* 535 U.S. 685, 694 (2002); *Turrentine v. Mullin,* 390 F.3d 1181, 1188-89 (10th Cir. 2004).

Where the state court has passed on the merits of a federal constitutional claim, it is presumed the factual findings of the state trial and appellate courts are correct. A habeas petitioner bears the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *Darks v. Mullin,* 327 F.3d 1001, 1007 (10th Cir. 2003).

Even if a state court decision on the merits of a federal constitutional claim is contrary to or an unreasonable application of clearly established federal law as determined by the Supreme Court, unless the error is a structural defect in the trial mechanism which defies analysis by harmless error standards, *Brecht v. Abramson,* 507 U.S. 619, 629 (1993), a reviewing court must apply the harmless error standards of *Brecht* and *O'Neal v. McAninch,* 513 U.S. 432 (1995). In instances where a harmless error standard applies, a petitioner in a habeas case is entitled to relief if the constitutional error complained of had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht,* 507 U.S. at 637. Where the reviewing court is in "grave doubt" about the effect of an error on the verdict such that the matter is evenly balanced or in "virtual equipoise," *O'Neal* instructs the reviewing court to treat the error as if it had a substantial and injurious effect. *O'Neal,* 513 U.S. at 435, *relying on Brecht,* 507 U.S. at 623.

On issues where the state court has not previously decided the federal constitutional claim on the merits, the deferential framework of 28 U.S.C. § 2254(d)(1)(2) does not apply. *E.g., Mitchell v. Gibson,* 262 F.3d 1036, 1045 (10th Cir. 2001).

Petitioner requests that Respondent or some other appropriate authority, such as the state courts, transmit the entirety of the state court record to this Court.

ARGUMENT

ISSUE I

THE ADMISSION OF KANITA BACY'S PRELIMINARY HEARING TESTIMONY VIOLATED MR. JOHNSON'S RIGHT TO CONFRONT WITNESSES AS THE PRIOR OPPORTUNITY TO CROSS-EXAMINE THE WITNESSES WAS NOT SUFFICIENT TO MEET THE REQUIREMENTS OF CRAWFORD V. WASHINGTON

A. Exhaustion.

This claim was raised in state court on direct appeal and ruled upon on the merits by the Oklahoma Court of Criminal Appeals in the unpublished Summary Opinion in *Johnson v. State*, No. F-2012-457. This claim has thus been exhausted by the state courts.

B. Merits

Under the AEDPA, a writ may not be granted unless the decision of the state court is "contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court of the United States, or "was based on an unreasonable determination of facts in light of the evidence presented." 28 U.S.C. § 2254(d)(1)-(2). A state court decision is contrary to federal law when it "arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or "decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Williams v. Taylor*, 529 U.S. 362, 412-13 (2000). A state court decision constitutes an unreasonable application of Supreme Court precedent when it "identifies the correct governing legal principle from

[Supreme Court] decisions but unreasonably applies that principle to the facts" of the case. *Id.* at 413. In Mr. Johnson's case, the OCCA identified the correct legal principle, but applied that principle unreasonably to the facts of Mr. Johnson's case.

The OCCA held that no Confrontation Clause violation occurred because Mr. Johnson "had sufficient opportunity to cross-examine the witness at the preliminary hearing." Ex. 1 at 3. It did not address Mr. Johnson's argument that he did not have a opportunity to fully cross-examine Ms. Bacy because she was not asked whether Mr. Joseph and his girlfriend were present in the apartment at the time of the shooting – and that this was so because Mr. Joseph's status as a witness was unknown to the defense at the time of the preliminary hearing. But this could have been a critical line of questioning at trial, especially considering Ms. Bacy was admittedly high on cocaine at the time of the incident. Was she even cognizant enough to truly remember who was in the room with her or what she saw? This is a line of questioning that would have been explored by a competent attorney at trial had Ms. Bacy been available to testify. The trial testimony of Mr. Joseph altered the landscape significantly, and would have required the defense attorney to explore deeper into Ms. Bacy's memory and perception given the new revelation that he was present at the scene and purportedly saw a different version of events.

Yet the OCCA dismissed the claim in a single paragraph, simply stating, "The fact that [Mr. Johnson] has now thought of additional questions to ask the witness, or new ways to ask old questions, does not mean that his right to confront the witness, at the time, was in any way curtailed." Ex. 1 at 3. But this misses the point. Cross-examination of a witness at preliminary hearing is inherently curtailed when material new evidence comes to light *after* the preliminary hearing that puts into question the perception and veracity of preliminary hearing testimony. While no case so holds, this novel proposition complies with the spirit of the Confrontation Clause.

Trial counsel was not thwarted by the trial court in any way at the preliminary hearing – but because new evidence in the form of an entirely new eyewitness, previously unknown, came to light only after the preliminary hearing -- in retrospect, trial counsel was inhibited. Trial counsel was curtailed by the inability to know that a critical new eyewitness would appear. As a result, Mr. Johnson never had the opportunity to confront Ms. Bacy with this new evidence to find out if she would corroborate his presence, or if she was too inebriated to be able to tell who was in the room with her (thereby also placing into question her ability to know or truly recall what it was she saw). Accordingly, his ability to fully cross-examine Ms. Bacy at preliminary hearing actually was limited. That the OCCA held otherwise was an unreasonable application of *Crawford* accordingly.

ISSUE II

THE STATE FAILED TO DISPROVE THE DEFENSE OF SELF-DEFENSE BEYOND A REASONABLE DOUBT MAKING THE EVIDENCE INSUFFICIENT TO SUPPORT A CONVICTION

A. Exhaustion.

This claim was raised in state court on direct appeal and ruled upon on the merits by the Oklahoma Court of Criminal Appeals in the unpublished Summary Opinion in *Johnson v. State*, No. F-2012-457. This claim has thus been exhausted by the state courts.

B. Merits.

As with Issue I, this ground for relief asserts that the constitutional standards set forth by the Supreme Court in *Jackson* and *Winship* have not been adhered to by and the state courts of Oklahoma in Mr. Johnson's case.

The United States Supreme Court has explicitly held "that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). An appellate court reviewing a claim of insufficient evidence to convict under this standard applies the test espoused by the Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979). Under *Jackson*, the test is whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt; or, put another way, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson, supra*, 443 U.S. at 319. It is Mr. Johnson's contention that the OCCA applied this test in an unreasonable manner.

The appellate court found that "witnesses described [Mr. Johnson] arguing with the victim, threatening to get a gun and kill him, and later, going to the victim's apartment and shooting him. There was testimony that the victim struggled with [Mr. Johnson] over the gun, but only after the victim had been shot; the blood on [Mr. Johnson's] clothing corroborated this account." Ex. 1 at 3. Based on these findings, and citing *Jackson*, the OCCA concluded that a rational juror could find, beyond a reasonable doubt, that Petitioner "did not shoot the victim in self-defense, but with malice." *Id*.

Mr. Johnson was shot in the foot. The defense theory was that Mr. Johnson received this wound from Mr. Marzett, and prior to a tussle over the gun that ensued as a result, and during which time Mr. Johnson shot the gun in self-defense, hitting Mr. Marzett in the back. The evidence at trial did not support this theory, beyond the somewhat suspect testimony of Mr. Joseph who testified that Mr. Johnson was shot first, and the medical evidence that Mr. Marzett was shot in the back at close range. Nevertheless, the remaining testimony did not sufficiently support beyond a reasonable doubt the prosecution theory that Mr. Johnson shot Mr. Marzett first, and with malice.

No prosecution witness claimed to have seen the shooting except Kanita Bacy. She testified that she "clearly" saw Mr. Johnson step into the apartment and shoot Mr. Marzett in the chest – yet medical evidence shows she could not have seen that, as Marzett was shot in the back, not the chest. She also admitted that she was high on cocaine at the time.

No one else saw what happened. And there was repeated testimony that two shots were fired. While there was evidence presented that Mr. Johnson tried to dissuade witnesses from testifying against him, such testimony does not establish beyond a reasonable doubt that Mr. Johnson did not shoot Mr. Marzett in self defense. He knew no testimony whatsoever was the best chance he had at escaping the odds of conviction. While this does not excuse his behavior, it does not mean that he shot Marzett first beyond a reasonable doubt.

Under Oklahoma law, "it is the burden of the State to prove beyond a reasonable doubt that the defendant was not acting in self-defense." *See Oklahoma Jury Instruction 8-49*. This instruction must be given in Oklahoma criminal trials when the evidence warrants it, as it did in Foster's case. *Perez v. State*, 798 P2 639, 641 (Okla. Crim App. 1990).

That the jury found beyond a reasonable doubt that the defendant was not acting in self-defense is not rational in light of the fact that the one eyewitness who claims that she saw Mr. Johnson shoot Mr. Marzett first was high on cocaine and testified that she clearly saw Mr. Marzett get shot in the chest, when the medical evidence showed he was not shot in the chest. Another eyewitness, albeit also with inconsistencies and also with admitted drug use at the time, stated that Mr. Marzett shot Mr. Johnson first.

While neither eyewitness presents entirely trustworthy testimony, there was no reason for a rational juror to accept Ms. Bacy's version of events when they did not comport with the physical evidence, even if they chose to reject Mr. Joseph's testimony. Ms. Bacy stated that she clearly saw Mr. Johnson shoot Marzett in the chest (not that she saw a wound and assumed he had been shot in the chest – she stated she clearly saw the actual act of the shooting in the chest). She could not have seen this when that is not what happened. A rational juror therefore could not conclude that the State had proven beyond a reasonable doubt that the shooting was not in self-defense.

III[1]

THE PROSECUTORS ENGAGED IN IMPROPER ARGUMENT BASED ON FACTS NOT IN THE RECORD RELATING TO KANITA BACY'S ABSENCE FROM TRIAL VIOLATING MR. JOHNSON'S RIGHT TO A FAIR TRIAL AND RIGHT TO CONFRONT WITNESSES

A. Exhaustion.

This claim was raised in state court on direct appeal and ruled upon on the

[1] Mr Johnson's Petition has as Ground III a *Batson* claim; however, upon closer review, counsel has elected to witndraw that claim. Hence the Ground IV stated in the Petition is now Issue III herein.

merits by the Oklahoma Court of Criminal Appeals in the unpublished Summary Opinion in *Johnson v. State*, No. F-2012-457. This claim has thus been exhausted by the state courts.

B. Merits.

During closing argument, the prosecutor suggested that Ms. Bacy's absence from the trial was the result of Mr. Johnson's attempts to intimidate the witness. During his direct appeal to the OCCA, Mr. Johnson moved to supplement the record with an affidavit from Ms. Bacy who was confined in the Oklahoma County Detention Center in support of the argument that the prosecution's closing argument relied on facts outside the record and presented a false argument that intimidation by Mr. Johnson had kept her from testifying at trial. Ms. Bacy's affidavit claimed that her absence from the trial had nothing to do with intimidation. Ex. 1 at 4. In rejecting this claim, the OCCA found that "[t]he evidence at trial included recordings of numerous phone calls [Mr. Johnson] made from the county jail, wherein he exhorts associates to make sure any witnesses would testify favorably to him. The prosecutor's comments were proper inferences therefrom." Ex. 1 at 5, citing *Hanson v. State,* 72 P.3d 40 (Okla. Crim. App. 2003). Thus, state evidentiary rules were the basis for its decision, rather than federal precedent.

However, the State ignored Supreme Court precedent holding that a prosecutor's improper comments violate the Constitution when they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168 (1986), citation omitted. The prosecutor repeatedly told the jury that Ms. Bacy was not there because she had been intimidated by Mr. Johnson. Yet, that was not the reason she did not testify. While the prosecutor could not have known it at the time, Ms. Bacy's reasons for not being there had nothing to do with Mr. Johnson. The prosecutor's argument to the jury that Mr. Johnson "has been [expletive' with the witnesses" and that "That's why you saw Kanita Bacy via one of the [prosecutors] reading her transcript" went too far in a situation where Mr. Johnson did not have the opportunity to disprove the prosecutor's argument for the very reason that the witness was absent. Evidence of phone calls to witnesses recorded at the jail would have been enough; the prosecution went too far when it stated that Mr. Johnson in fact threatened Ms. Bacy into not showing up for trial. The prosecutor's closing argument thus amounted to a denial of his right of confrontation. Mr. Johnson was entirely prevented from disproving the prosecution's theory by virtue of Ms. Bacy's absence.

V

TRIAL ERRORS, WHEN CONSIDERED IN CUMULATIVE FASHION, WARRANT A NEW TRIAL

A. Exhaustion.

This claim was raised in state court on direct appeal and ruled upon on the merits by the Oklahoma Court of Criminal Appeals in the unpublished Summary Opinion in *Johnson v. State*, No. F-2012-457. This claim has thus been exhausted by the state courts.

B. Merits.

The Tenth Circuit Court of Appeals recently addressed the issue of cumulative erros and explained the doctrine means "that prejudice can be accumulated disjunctively – that all a defendant needs to show is a strong likelihood that the several errors in his case, when considered additively, prejudiced him." *Grant v. Trammel*, 727 F. 3d 1006, 1026 (10th Cir. 2013). Thus, "while one error may make another error in the same direction more egregious, a defendant can still show cumulative error by accumulating unrelated errors if their probabilistic sum sufficiently undermines confidence in the outcome of the trial." *Id.* Mr. Johnson claims that he has demonstrated two or more actual errors and therefore he is entield to habeas relief. *Moore v. Reynolds*, 153 F.3d 1086 1113 (10th Cir. 1998).

CONCLUSION

For the foregoing reasons, Petitioner requests: 1) a full and fair evidentiary hearing as to any issues which involve facts disputed by the State; 2) that the Court issue a writ of habeas corpus ordering a new trial; 3) that the Court grant such other relief as may be appropriate as to dispose of the matter as law and justice require.

/s/ *Laura K. Deskin*

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of May, 2015, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing; and also transmitted a hard copy via U.S. Mail, first-class postage pre-paid thereon, to:

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/s/ *Laura K. Deskin*
Laura K. Deskin